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No. 09-23

In the Supreme Court of the United States

RICHARD A. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld a jury finding that petitioner was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 555 F.3d 1158. The memorandum decision and order of the district court denying petitioner's motion for a new trial (Pet. App. 31-37) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet App. 30) was entered on February 17, 2009. A petition for rehearing was denied on April 3, 2009 (Pet. App. 38). The petition for a writ of certiorari was filed on June 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Employers are required to withhold Federal Insurance Contribution Act and federal income taxes from

their employees' wages and to remit the amounts withheld to the United States. 26 U.S.C. 3102(a), 3402(a). The withheld taxes constitute a special fund held in trust for the United States. 26 U.S.C. 7501(a); see *Slodov* v. *United States*, 436 U.S. 238, 243 (1978). If an employer withholds payroll taxes but fails to pay them over to the government, the government may collect the amount of unpaid tax from a "responsible person"—that is, "[a]ny person required to collect, truthfully account for, and pay over any tax" who "willfully fails" to do so. 26 U.S.C. 6672(a); see *Slodov*, 436 U.S. at 244-246 & n.7. A "person," for purposes of Section 6672(a), "includes an officer or employee" who "is under a duty to perform the act in respect of which the violation occurs." 26 U.S.C. 6671(b).

2. In 1991, petitioner began working for Woodruff Printing, Inc., a corporation owned by the Woodruff family, and became its general manager. Petitioner left the company in 2000. In January 2002, petitioner returned to Woodruff Printing as its general manager, after insisting that he be put in charge of overall operations. Pet. App. 2-3.

Upon his return to Woodruff Printing, petitioner became the corporation's contact with the Internal Revenue Service (IRS). Petitioner created a system to remit electronically the employment taxes that Woodruff Printing was required to withhold from employees' wages under Sections 3102(a) and 3402(a). Pet. App. 3. Petitioner was also given authority to write checks on Woodruff Printing's bank account. *Id.* at 5.

Petitioner was aware before he returned to Woodruff Printing that the corporation was experiencing financial difficulties. Pet. App. 3. By July or August 2002, some suppliers began demanding payment on delivery. In

response, Mark Woodruff, the company's president, prioritized payment to certain suppliers, as well as the corporation's bank lenders and its landlord. *Id.* at 3-4.

In August 2002, an employee in Woodruff Printing's accounting department informed Smith and the company's president, Mark Woodruff, that there were unpaid employment taxes for June and July. When Mark Woodruff learned that the payroll taxes were delinquent, he called a meeting with petitioner and the accounting department to discuss the problem. Later that year, upon discovering that the payroll taxes remained unpaid, Mark Woodruff instructed petitioner that tax payments should always be kept current. Pet. App. 4.

In late 2002, Mark Woodruff and his family decided that Woodruff Printing's payments to creditors should be monitored more closely. They also decided that petitioner should write checks only in amounts less than $5000. Pet. App. 4-5. Petitioner still occasionally wrote checks in larger amounts, however, and his authority to pay payroll taxes by electronic funds transfer was never limited. *Id.* at 5. Woodruff Printing ceased operations in 2003. *Ibid.*

3. The IRS made assessments against petitioner totaling $279,353 in unpaid payroll taxes for the last two quarters of 2002 and the first three quarters of 2003.[1] Petitioner paid a portion of the assessments and filed a claim for refund. After that claim was denied, he filed a refund suit in the United States District Court for the District of Utah. The government counterclaimed for the balance due. Pet. App. 7.

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[1] Assessments under Section 6672 were also made against Mark Woodruff, who did not contest his liability. The district court entered a stipulated judgment against him for $324,732. Pet. App. 7 n.1.

After presenting his case at trial, petitioner moved for judgment as a matter of law. The district court denied the motion. Pet. App. 2.

At the close of trial, the district court instructed the jury that a "responsible person," for purposes of Section 6672(a), "includes any person who is connected or associated with the corporation-employer in such a manner that he has the power to see that the taxes are paid, or the power to make significant decisions concerning the corporation, or determines that creditors are to be paid and when they are to be paid." Pet. App. 16-17, 39. In the same instruction, Jury Instruction No. 20, the court informed the jury that "[d]etermining who is a responsible person is fact specific," and that "the 'responsible person' is any person who can effectively control the finances, or determine the bills that should or should not be paid." *Id.* at 17, 39-40. In the following instruction, Jury Instruction No. 21, the court told the jury that "[a] corporate officer or employee is a responsible person if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation"; that "[w]hether a person is a responsible person must be decided by the unique facts of each case"; and that "[t]he crucial inquiry is whether the person had the effective power to pay the taxes." *Id.* at 20, 40-41.

The jury found petitioner liable for the unpaid payroll taxes under Section 6672(a). Pet. App. 2. Petitioner then moved for a new trial, arguing that the jury had been erroneously instructed. The district court denied the motion, finding no error in the jury instructions. *Id.* at 31-37.

4. The court of appeals affirmed. Pet. App. 1-29. The court first upheld the district court's denial of judg-

ment as a matter of law, concluding that the jury's finding that petitioner was a responsible person under Section 6672 was not "against the great weight of all the evidence." *Id.* at 15; see *id.* at 7-15. The court explained that, for purposes of Section 6672,

> [i]ndicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decision-making of the corporation.

Id. at 10 (quoting *Denbo* v. *United States*, 988 F.2d 1029, 1032 (10th Cir. 1993)). The court noted that the evidence in this case showed that petitioner ran the business as general manager, wrote checks paying other creditors, had the unrestricted authority to pay the payroll taxes electronically, and had been instructed by Mark Woodruff to keep taxes current. *Id.* at 13-14. That evidence, the court concluded, was sufficient to support the jury's verdict. *Id.* at 15.

Petitioner argued that he could not be a "responsible person" because "he was simply doing what he was told by Mark Woodruff, and that he had no power over creditor priority at Woodruff Printing." Pet. App. 11. The court of appeals rejected that contention. The court noted that the evidence showed that Mark Woodruff had not limited petitioner's authority to pay payroll taxes, and in fact had instructed petitioner to keep taxes current. *Id.* at 11-12. The court further explained that "[t]he fact that Mark Woodruff had *more* control over

creditor payment than [petitioner] is not determinative; 'significant' control is all that is required." *Id.* at 12 (quoting *Denbo*, 988 F.2d at 1033). The court acknowledged that petitioner was not a stockholder and that his power to hire and fire was disputed at trial. *Id.* at 15. The court concluded, however, that those facts were "merely factors to be considered amongst the totality of circumstances," and were insufficient in themselves to demonstrate that petitioner was not a "responsible person" under Section 6672(a). *Ibid.*

The court of appeals also affirmed the denial of a new trial, rejecting petitioner's argument that the jury instructions given by the district court had misstated the law governing "responsible person" status under Section 6672(a). Pet. App. 15-28. The court held that Jury Instruction No. 20 had correctly informed the jury that "the definition is fact-intensive," and that "it is not mere check-writing authority that determines whether an individual is a 'responsible person,' but that the 'responsible person' must have a higher degree of control over the corporation's finances." *Id.* at 18-19. The court of appeals further concluded that any ambiguity on that point had been "immediately rectified" by Jury Instruction No. 21, which correctly stated that "[t]he crucial inquiry is whether the person had the effective power to pay the taxes." *Id.* at 20. The court of appeals also upheld the district court's refusal to instruct the jury that infusing capital into a business is an indicium of responsibility. *Id.* at 25-26. The court explained that the instructions given at petitioner's trial, taken "as a whole, properly stated the overarching law on the question of who qualifies as a 'responsible person' based on the unique facts of each case." *Id.* at 26.

ARGUMENT

1. Petitioner contends (Pet. 5-16) that the evidence at trial was insufficient as a matter of law to support a finding that he was a person responsible for withholding, accounting for, and paying over trust fund taxes on behalf of a corporation under 26 U.S.C. 6672. The court of appeals correctly rejected that contention, and its fact-bound conclusion does not conflict with any decision of this Court or the decisions of other courts of appeals. Further review is not warranted.[2]

a. As the court of appeals explained, an officer or employee is a "responsible person" under Section 6672 if the "totality of circumstances" demonstrate that the individual "had the effective authority to pay the taxes." Pet. App. 15, 21. In this case, the jury determined that petitioner was such a responsible person, and the court of appeals correctly held that the jury's finding was not "against the great weight of all the evidence." *Id.* at 15. The evidence showed that petitioner was Woodruff Printing's general manager, running its business on a day-to-day basis; that petitioner oversaw Woodruff Printing's finance and accounting functions; that, despite limits placed on his check-signing authority, petitioner signed checks on behalf of the corporation for amounts larger than $5000; and that petitioner's authority to pay federal taxes by means of electronic funds transfer was never

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[2] Although petitioner filed a motion for judgment as a matter of law at the conclusion of his case, he does not appear to have renewed that motion after the jury rendered its verdict. Under this Court's decision in *Unitherm Food Systems, Inc.* v. *Swift-Eckrich, Inc.*, 546 U.S. 394, 399-406 (2006), petitioner's challenge to the sufficiency of the evidence therefore was not properly before the court of appeals. The government did not argue in the Tenth Circuit, however, that *Unitherm* foreclosed petitioner's sufficiency challenge.

restricted. *Id.* at 11. Based on that evidence, the jury acted reasonably in concluding that petitioner was responsible for the payment of payroll taxes under Section 6672(a).

b. Petitioner contends (Pet. 5-16) that this Court's review is warranted because the decision below conflicts with decisions of other courts of appeals. That contention lacks merit.

Petitioner first argues (Pet. 5-9, 13) that the decision below implicates a conflict among the courts of appeals as to whether a "responsible person" must have the "*final word* as to what bills should or should not be paid and when," Pet. 5 (quoting *Caterino* v. *United States*, 794 F.2d 1, 5 (1st Cir. 1986), cert. denied, 480 U.S. 905 (1987)), or whether "significant financial authority" is sufficient, Pet. 7. But as petitioner appears to acknowledge (Pet. 6), the courts that have articulated what he calls the "final word doctrine" have made clear that "the word 'final'" in this context "means *significant* rather than exclusive control over the disbursement of funds." *Caterino*, 794 F.2d at 5 (emphasis added) (citations omitted); accord *Purcell* v. *United States*, 1 F.3d 932, 937 (9th Cir. 1993) ("[A]n individual may be said to have 'had the final word as to what bills should or should not be paid' if such individual had the authority required to exercise significant control over the corporation's financial affairs."). The decision below is consistent with that approach. See Pet. App. 12 ("'[S]ignificant' control is all that is required.").

Petitioner further contends (Pet. 8) that the courts of appeals have identified different indicia of responsibility, "creating a second, material split in the circuits." That argument also lacks merit. In each of the cases petitioner cites, the court of appeals made clear that the

determination whether a person has the "significant control" necessary to establish responsibility under Section 6672(a) depends on the "totality of the circumstances." *E.g.*, *Winter* v. *United States*, 196 F.3d 339, 345 (2d Cir. 1999). While the courts have identified various indicia of responsibility, they have not purported to assemble an exhaustive list. See *ibid.*; *Greenberg* v. *United States*, 46 F.3d 239, 243 (3d Cir. 1994); *Denbo* v. *United States*, 988 F.2d 1029, 1032 (10th Cir. 1993); see also *Taylor* v. *IRS*, 69 F.3d 411, 416 (10th Cir. 1995) ("In this circuit, we have set forth a non-exclusive list of factors demonstrating 'indicia of responsibility.'"). That the courts of appeals may have identified somewhat different indicia of responsibility in different cases thus does not mean, as petitioner suggests, that they have applied conflicting standards in evaluating responsibility under Section 6672(a).[3]

Finally, petitioner contends (Pet. 10-16) that the decision below conflicts with *Vinick* v. *United States*, 205 F.3d 1 (1st Cir. 2000), and *Godfrey* v. *United States*, 748 F.2d 1568 (Fed. Cir. 1984), because it "weighed status and involvement in day-to-day activities far more heavily" than the courts in those cases. Pet. 12. Petitioner is incorrect. In *Vinick*, the court concluded that the taxpayer—a corporation's accountant, shareholder, and nominally its treasurer—was not a responsible person under Section 6672 in part because he was not involved in day-to-day operations, lacked access to the corporate checkbook, and had no say in paying creditors. 205 F.3d at 11-12; see Pet. App. 12-14. Similarly in *Godfrey*, the

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[3] Petitioner's contention (Pet. 9) that the Sixth and Ninth Circuits do not "use the indicia standard at all" is incorrect. See *Gephart* v. *United States*, 818 F.2d 469, 473 (6th Cir. 1987); *United States* v. *Jones*, 33 F.3d 1137, 1139-1140 (9th Cir. 1994).

court held that a board chairman was not a responsible person because, *inter alia*, he was uninvolved in day-to-day fiscal matters, had no check-signing authority or control over payroll, and did not decide which creditors to pay. 748 F.2d at 1576. Petitioner thus identifies no conflict among the courts of appeals that would warrant this Court's intervention.

2. Petitioner also argues (Pet. 16-18) that the court of appeals erred in upholding the jury instructions in this case. That argument lacks merit.

Petitioner principally contends (Pet. 16-18) that Jury Instruction No. 20 placed undue emphasis on check-writing authority, and that the court of appeals erred in concluding that Jury Instruction No. 21 "fixed" that problem. As the court of appeals explained, however, Jury Instruction No. 20 "makes clear that it is not mere check-writing authority that determines whether an individual is a 'responsible person,' but that the 'responsible person' must have a higher degree of control over the corporation's finances." Pet. App. 19. Moreover, contrary to petitioner's contention (Pet. 18), the court of appeals held that Jury Instruction No. 20 "correctly inform[ed] the jury that the definition [of a responsible person] is fact-intensive," and that Jury Instruction No. 21 "reinforce[d] the point." Pet. App. 18, 20.

There is, in particular, no merit to petitioner's contention (Pet. 17) that the court of appeals' approach in this case conflicts with this Court's decision in *Estelle* v. *McGuire*, 502 U.S. 62 (1991). The Court in *Estelle* emphasized that an allegedly deficient jury instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* at 72 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973)). Consistent with that prin-

ciple, the court of appeals emphasized that its task was "to determine whether, *taken as a whole*, the jury instructions accurately state the governing law." Pet. App. 19. Petitioner's factbound contention that the Tenth Circuit misapplied that standard to the instructions given in this case raises no legal issue of broad significance warranting this Court's review.

Petitioner also contends (Pet. 18) that the district court violated his due process rights by failing to charge the jury that the infusion of capital into a business is one of the indicia of responsibility under Section 6672. The court of appeals noted that the infusion of capital is a factor that may be considered by a jury, but correctly held that the charge "as a whole, properly stated the overarching law" of responsibility, "based on the unique facts of each case." Pet. App. 26.

Finally, petitioner contends (Pet. 18) that Jury Instruction No. 21 "clearly minimized the importance of having the final word over the payment of creditors in determining who had significant financial control over business operations." Petitioner did not, however, challenge Jury Instruction No. 21 in the court of appeals. See Pet. App. 20. This Court ordinarily declines to consider claims that were neither pressed nor passed on below, *e.g.*, *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987), and there is no reason to depart from that practice in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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